

SOUTH AFRICA / JUDGMENT

S v Fynn (2011 (2) SACR 178 (KZP)) [2011] ZAKZPHC 6; DR 619/10 (10 February 2011) [2011] ZAKZPHC 6

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Ndlovu, Mokgohloa

CASE / FILE NUMBER

DR 619/10

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IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO. DR 619/10

REPORTABLE

In the matter between:

THE STATE

and

BARON FYNN

REVIEW JUDGMENT

Delivered on 10 February 2011

NDLOVU J

- [1] This matter served before me as a special review, having been submitted by the District Magistrate of Port Shepstone.
- [2] On 16 September 2009 an admission of guilt fine in the sum of R100,00 was paid by the accused in respect of an assault common charge preferred against him in terms of a “Written Notice To Appear” issued in terms of the Criminal Procedure Act¹ (the CPA). The conviction and the fine were confirmed by the Magistrate (not necessarily the District Magistrate) on 17 September 2009². Since then nothing happened until 28 September 2010 when the District Magistrate received a letter from the accused in which the accused requested that the case be re-opened on the ground that he paid the admission of guilt fine under some sort of coercion at the hands of certain police officers who attended to him at

the police station in Port Shepstone. Despite the alleged coercion, the accused did not report his complaint to the relevant police authorities.

- [3] It was apparent from the accused's letter that what prompted him to pursue the matter only at this time (which was over a year since he paid the fine) was the fact that after he submitted an application, through a recruitment agency, for employment in the body-guarding and security industry (which was his career path) he was subsequently informed by the agency about the fact of his previous conviction for assault (arising from his admission of guilt fine payment). Presumably he was also advised, or he simply discerned, that the previous conviction potentially damaged his prospects of finding employment in the said industry.
- [4] The matter appeared for the first time before My Brother Swain J who issued a query to the fact that before the matter could be considered by way of special review the accused would have to set out in an affidavit form what his defence was to the charge of common assault and further that in the affidavit the accused would have to include the averments contained in his letter and also to explain why he paid the admission of guilt fine.³ The accused has since filed the affidavit in which he addressed the issues raised in the review query.
- [5] In his affidavit the accused elaborated on the allegations which he made in his initial letter against the said police officers. Significantly, the identities of the officers concerned are apparently unknown to the accused.
- [6] Section 57 of the CPA provides, in part:
- “(1) Where-
- (a) a summons is issued against an accused under section 54 (in this section referred to as the summons) and the public prosecutor or the clerk of the court concerned on reasonable grounds believes that a magistrate's court, on convicting the accused of the offence in question, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, and such public prosecutor or clerk of the court endorses the summons to the effect that the accused may admit his guilt in respect of the offence in question and that he may pay a fine stipulated on the summons in respect of such offence without appearing in court; or
- (b) a written notice under section 56 (in this section referred to as the written notice) is handed to the accused and the endorsement in terms of paragraph (c) of subsection (1) of that section purports to have been made by a peace officer, the accused may, without appearing in court, admit his guilt in respect of the offence in question by paying the fine stipulated (in this section referred to as the admission of guilt fine) either to the clerk of the magistrate's court which has jurisdiction or at any police station within the area of jurisdiction of that court or, if the summons or written notice in question is endorsed to the effect that the fine may be paid at a specified local authority, at such local authority.”

Subsection (6) of section 57 provides that once the clerk of the court has entered the particulars of the admission of guilt in the criminal record book the accused concerned shall, subject to subsection (7), be deemed to have been convicted and sentenced by the court in respect of the offence in question. Subsection (7) deals with the process of examination by “the judicial officer presiding at the court in question” of the admission of guilt documents to satisfy himself or herself that the conviction or sentence is in accordance with justice and the procedure incidental thereto.

[7] It is clear, from what I have said above, that the accused only seeks to be cleared of this criminal record (even if it was to be for the time being pending the trial) for the purpose of his employment application with the recruitment agency referred to

above. I have some doubt about the accused’s bonafides in this regard. However, it is not necessary to elaborate on this point since I propose to deal with the matter from a different perspective. Suffice to say that, in my view, the prospects of success of the review would have been minimal if considered on the ground put forth by the accused.

[8] I have perused the notice in which the charge is embodied. Indeed, I am concerned by the incomplete and shoddy manner in which it was framed. In my view, it was fatally defective. The essentials of a charge are governed by section 84 of the CPA which provides:

“(1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.

Where any of the particulars referred to in subsection (1) are unknown to the prosecutor it shall be sufficient to state that fact in the charge. In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient.”

[9] In *S v Hugo*⁴ Miller JA said: ‘An accused person is entitled to require that he be informed by the charge with precision, or at least with a reasonable degree of clarity, what the case is that he has to meet . . .’ The Constitution now gives an accused person a

right to be informed of the charge with sufficient detail in order to enable him or her to answer it.⁵

[10] The Full Bench of this Division in *R v Mbokazi*⁶ made it clear (per Broome JP):

“In my opinion it is a necessary preliminary to any admission of guilt that there shall be a formal record somewhere of the offence and the particulars of the offence in respect of which the accused person is admitting his guilt. It is outrageous to imagine a state of affairs in which an accused person could, on his own admission, be convicted of an offence which has never been so formally stated. Normally a

formal statement of the offence charged is contained in a summons and the accused person, by signing an admission of guilt, admits his guilt in regard to that offence. The result of this proposition is that if an accused person signs an admission of guilt in respect of a statement which does not disclose an offence, no conviction resulting therefrom can be a valid conviction”

[11] Therefore, notwithstanding any submissions or representations which an accused person may seek to make, it is an essential prerequisite that any charge referred to in a criminal summons, written notice or other formal statement must, on its face, be clear and sustainable to the extent that, were the accused to have opted not to pay the admission of guilt fine but to proceed to trial, he or she would have been able to plead to that charge as it stood in the summons, notice or other formal statement, as the case may be. On this basis, it seems to me, the signing of admission of guilt is equivalent to a plea of guilty in a court of law in respect of the charge concerned⁷ and, in this regard, the charge must in every respect conform to the requirements of a valid charge as set out in the CPA.⁸

[12] In the present instance the charge of assault common as set out in the Written Notice To Appear (Form 534) did not indicate the identity of the person whom the accused allegedly assaulted and how or with what the assault was committed, nor did it even attempt to allege that any person was assaulted by the accused. The notice read as follows:

“... that upon or about 15 day of September 2009 at or near Wattle Drive, Meraewood (sic) in the said district (Port Shepstone) he did wrongfully and unlawfully assault common” (The information in italics was inserted in ink on the form).

[13] It followed, therefore, that the accused signed an admission of guilt based on a notice which did not disclose the offence but merely reflected the name of the offence. In the event, the deemed conviction, so as the sentence in the form of admission of

guilt fine, cannot stand.

[14] Accordingly, I make the following order:

1. The conviction of the accused and the admission of guilt fine of R100,00 (which he paid to the Clerk of the Magistrate’s

Court, Port Shepstone on 16 September 2009) are hereby set aside.

2. The matter is left in the discretion of the police and/or the prosecutorial authority whether or not they deem it necessary in the interests of justice to reinstate the matter by recharging the accused in the proper manner, in the light of this

Judgment.

NDLOVU J

_____ I agree.

MOKGOHLOA J

1Section 56 of Act 51 of 1977

2In terms of section 57(7) of the CPA.

3S v Cedras 1992 (2) SACR 530 (C)

4 1967

(4) SA 536 (A) at 540E; see also S v Ismail & others 1993

(1) SACR 33 (D) at 40D

5Section 35(3)(a) of Act 108 of 1996

6 1958

(3) SA 742 (N) at 743 F-H.

7See R v Mbokazi, *supra*, at 743F-G.

8See section 84, *supra*,

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